No. 83-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LANDRETH TIMBER COMPANY,
Petitioner,

v.

IVAN K. LANDRETH, LUCILLE LANDRETH,
THOMAS E. LANDRETH, IVAN K. LANDRETH, JR.,
AND KATHLEEN LANDRETH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the purchasers of all the common stock of a conventional business corporation acquired "securities" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934, entitling them to the protections afforded by those statutes.

PARTIES INVOLVED

The petitioner is Landreth Timber Company, a corporation organized under the laws of the State of Delaware. The Class A shares of Landreth Timber Company, representing 85% of the equity of the corporation, are owned by Samuel S. Dennis, Esq. and the estate of John Bolten. The Class B shares, representing the remaining 15% of the equity, were held by Mr. Jack Branch, Mr. and Mrs. Al Willard, Mr. Troy N. Beaver, Mr. Troy N. Beaver, Jr., and Mr. Robert E. Branch at the time the action was commenced.

The respondents are Ivan K. Landreth, Lucille Landreth, Thomas E. Landreth, Ivan K. Landreth, Jr. and Kathleen Landreth.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on March 7, 1984, and is reproduced in the Appendix to the Petition for Certiorari ("Pet. A.") at 1a-10a. One paragraph of that opinion was modified by an order dated April 24, 1984.[1] Pet. A. 11a-

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[1] The April 24, 1984 Order, deleted the paragraph at page 2-3 of the original opinion, which had read:

> For a variety of reasons, Landreth II was unprofitable. Landreth underestimated the cost of rebuilding the mill. Much

12a. The opinion, as modified, is reported at 731 F.2d 1348. The unreported order and judgment of the United States District Court for the Western District of Washington is reproduced at Pet. A. 12a-21a.

JURISDICTION

Jurisdiction to review the judgment of the United States Court of Appeals by writ of *certiorari* exists pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in the opinion and order of the Court of Appeals, and to be construed here, are the definitional sections of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* The relevant portions of the definitional sections of those Acts, 15 U.S.C. §§ 77b (1) and 78c(a)(10) are reproduced at Pet. A. 22a-23a.

STATEMENT OF THE CASE

Because the Court of Appeals was reviewing the grant of the respondents' motion for summary judgment, it was obligated to view the facts in the light most favorable to the petitioner, resolve all disputed facts in the petitioner's favor, and afford the petitioner all favorable inferences arising from those facts. *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). Viewed from that perspective, the record before the Court of Appeals revealed the following facts.

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of the machinery Landreth had warranted was operable was not. Appellant completed the rebuilding and replaced the inoperable machinery, but the productive capacity of the completed mill was considerably below Landreth's prediction. Unable to operate the mill profitably, Landreth II sold the mill and went into receivership.

The Order added the following to the next paragraph:

Landreth II was unprofitable. It sold the mill, and went into receivership.

In 1976 Ivan K. Landreth and his two sons,[2] the shareholders of Landreth Timber Company ("Landreth Timber") located in Tonasket, Washington, offered their stock for sale through both Washington and out-of-state brokers.[3] R. 93, 11-14, 157, 158; R. 123, 2; R. 69, 277. Ivan K. Landreth had operated Landreth Timber since 1954. R. 69, 222. In May 1977, before a purchaser could be found, Landreth Timber's sawmill was extensively damaged by fire. R. 69, 224. Despite the fire, the Landreths' brokers continued to attempt a sale, reporting that the inoperable mill would be rebuilt and a computerized component added which would increase substantially the sawmill's productivity when it was rebuilt. R. 69, 233; R. 93, 44.

Relying upon information provided by Mr. Landreth to his local broker, R. 93, 51, 54, 56, 66-83, 87, one broker offered Landreth Timber by means of a letter. J.A. 97. The letter contained representations of the type traditionally contained in offering memoranda, prospectuses, or other vehicles used to sell stock. It represented that the burned mill would be reconstructed and modernized from the insurance proceeds, the number of board feet of lumber the reconstructed mill would extract from logs,[4] the

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[2] Ivan K. Landreth, Jr. and Thomas E. Landreth. Also named as defendants were the wives of Mr. Landreth and his son Ivan K. Landreth, Jr., because the proceeds of the sale of their shares inured to the benefit of the marital community of each of these men and their wives.

[3] Citations to the record from the District Court for the Western District of Washington, as certified by the Clerk of the Court of Appeals for the Ninth Circuit, appear as ("R. ——, ——"). The title of and an identifying reference to each cited document is contained in Appendix A to this Brief.

[4] Logs are measured by a "scribner scale" which predicts the number of board feet of lumber they will produce. The reconstructed mill was represented to produce double the amount predicted by the scribner scale so that logs scaled to produce 100,000 board feet would produce 200,000 board feet. J.A. 98-99.

existing contracts,[5] the number of board feet the mill could produce per shift when reconstructed,[6] the ability of the reconstructed mill to operate two shifts per day, and the profits to be expected. J.A. 97-100.

The representations in the letter were false. Mr. Landreth had underestimated the cost of rebuilding the mill according to his plans. It could not be reconstructed from the insurance proceeds. J.A. 91-92. The mill, when reconstructed according to Mr. Landreth's plans, would not be capable of extracting the represented number of board feet from logs. J.A. 92-93. The existing chip contract referred to in the letter had been terminated because the mill could not produce commercially usable chips. R. 108, 76-77; R. 114, 3-5. The reconstructed mill would be incapable of producing the represented production per shift. J.A. 92-93.

Nonetheless, when the letter reached Mr. Samuel Dennis through a Massachusetts broker it had its intended effect. J.A. 81-82, 96. Mr. Dennis was then a 67 year old tax attorney who practiced in Boston, but lived in Florida during parts of the winter. J.A. 80-81. The letter interested him in Landreth Timber as an investment. J.A. 81. He contacted the late John Bolten, then an 84 year old friend and client who had retired to Florida, and informed him of the offer. J.A. 82-83, 95. Mr. Bolten, too, was interested. However, located a continent away, having no prior experience in the timber industry, J.A. 81, 346; Pet. A. 14a, and at an age when retirement income was more relevant than radical career changes, neither Mr. Bolten nor Mr. Dennis contemplated relocating to Washington to operate Landreth Timber. J.A. 81, 87-88; R. 148, 4-5.

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[5] The letter referred to a chip contract with Weyerhaeueser Corporation. J.A. 98. In fact, the contract had been with International Paper Company. R. 108, 76-77; R. 114, 3-5.

[6] The mill was represented to be capable of easily producing 200,000 board feet per two-shift day when reconstructed. J.A. 99.

Mr. Dennis contacted the broker who had written the letter. The broker confirmed the statements in the letter. J.A. 82. When Mr. Dennis asked that the business be evaluated, the broker retained an accountant who had no knowledge or experience in the lumber business, had no clients in the sawmill business and never had investigated the purchase of a company whose physical plant was under construction. J.A. 84; R. 137, 2; R. 69, 321; R. 93, 129. An engineering firm also was retained to inspect the inoperable mill. J.A. 86. Because the mill had operated only sporadically for many years, J.A. 109, and the company's internal management control was too weak to permit a preacquisition audit, R. 137, 4-5; R. 93, 131, the accountant and the engineering firm relied substantially upon information provided by Mr. Landreth. R. 137, 2, 4-5, 5-6.

The accountant visited Mr. Landreth at Landreth Timber. Mr. Landreth represented the lumber production costs, amount of finished lumber and receipts which could be expected, that the mill would be operational by November 1, 1977, and could produce more than half its output as a highly profitable, fine quality lumber.[7] R. 137, 2-5; J.A. 84-85. Those representations were passed on to Mr. Dennis. J.A. 84-85.

Mr. Dennis visited Tonasket only once prior to the acquisition. J.A. 86. Mr. Landreth assured Mr. Dennis that the represented productive capacity could be achieved and that the non-burned facilities were in good condition and suitable for use. J.A. 86-87. Indeed, Mr. Landreth had earlier represented that his accountant had valued his business at five to six million dollars. J.A. 83;

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[7] Mr. Landreth informed the accountant that the reconstructed mill "conservatively" could produce 52% of its output as the highly profitable "lamstock." Lamstock is a finely grained form of lumber produced under precise conditions and used in the laminating industry. In fact, the mill was incapable of achieving the required precision and could produce only low grade lumber. R. 137, 3-4.

R. 93, 158. In fact, no appraisal has been made, and Mr. Landreth had arrived at the numbers himself. R. 93, 15-16.

Because neither Mr. Dennis nor Mr. Bolten had the intent or ability to manage a corporation engaged in the timber business or the operation of a sawmill, they were concerned about the continuity and competency of Landreth Timber management should they purchase the company's stock. Pet. A. 14a; J.A. 87-88. Accordingly, Mr. Dennis asked Mr. Landreth to remain as general manager of the sawmill and to become a member of the board of directors of the new corporation. J.A. 87-88. Having previously cited personal health problems as the reason for the sale, R. 93, 158, Mr. Landreth declined both positions. J.A. 87-88. Instead, he agreed to assist in the company's management as a paid consultant when Mr. Dennis made the offer to purchase Landreth Timber stock contingent upon Mr. Landreth's continued involvement in the day-to-day operations of the sawmill. J.A. 87-88. He ultimately signed a consulting contract in which he acknowledged that his services were "unique and extraordinary," of "peculiar" value, and agreed:

> (a) to participate in the operation of the timber mill owned by the Company for the first six (6) months of the Consulting Period, and (b) for such purposes as the Company reasonably deems appropriate in the second six (6) months of the Consulting Period.

J.A. 159.

Motivated by the favorable treatment federal tax law provides to a seller of stock, the assumption of all liabilities by the purchasers, and the difficulty in assigning Forest Service contracts, Landreth required from the outset that the purchasers acquire the shares of Landreth Timber. J.A. 83; R. 123, 2. Negotiations resulted in a stock purchase agreement, with Mr. Dennis the purchaser, and Mr. Landreth and his sons the sellers of Landreth

Timber's common stock. J.A. 164. As the stock purchase agreement specifically contemplated, Mr. Dennis assigned his rights to a Delaware corporation, B & D Company[8] which had been formed for the sole purpose of acquiring Landreth Timber's common stock. J.A. 164, 165. After B & D Company became the owner of Landreth Timber's stock, it merged with Landreth Timber. The result was a Delaware corporation bearing the name of the original corporation, Landreth Timber Company. Messrs. Dennis and Bolten owned the Class A stock representing 85% of the equity. Six other persons, none of whom intended to become actively involved in Landreth Timber's operations, J.A. 87, owned the Class B shares representing the remaining 15% of the equity. J.A. 89.

After the acquisition was completed, the disparity between Mr. Landreth's representations and reality became apparent. The mill was not operating at the time of the acquisition. The actual post-acquisition cost of rebuilding the sawmill exceeded Mr. Landreth's figures by more than $500,000. J.A. 91-92, 270-74. Even then the sawmill never became fully operational. Mr. Landreth's representation that construction of the computerized portion of the mill would be completed within two weeks of the closing at a labor cost of $5,000 was shattered when approximately ten weeks and almost $90,000 were required. J.A. 91. Additionally, Landreth Timber's liability to the manufacturer of the computerized portion of the mill for materials exceeded Mr. Landreth's representations by approximately $80,000. J.A. 91. Moreover, almost $235,000 was expended after the closing for labor and equipment to complete construction of the non-computerized portion of the sawmill, an expenditure Mr. Landreth did not disclose was required. J.A. 92.

When the computerized mill was first tested in February 1978, existing components of the sawmill were dis-

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[8] The corporation was named B & D Company after Messrs. Bolten and Dennis.

covered to be incompatible with reconstructed portions, or to be defective and incapable of running for even a single shift, much less the two shifts warranted by Mr. Landreth. J.A. 87. Accordingly, major pieces of existing equipment had to be replaced at a cost of approximately $80,000. J.A. 91, 92.

Mr. Landreth's representation that the equipment was in good operating condition and capable of producing 200,000 board feet per day, J.A. 87, 89, 210-11, proved false. In fact, before the fire Mr. Landreth had operated the mill only sporadically. J.A. 109. He had not operated it for two shifts per day for a number of years and never had done so on a regular basis. R. 93, 5. Even after the inoperable machinery was replaced, the sawmill continued to experience abnormal problems due to the poor operating condition of the remaining used machinery. J.A. 91-92; R. 108, 103-04, 106-09, 111. It was incapable of producing the high grade lumber represented, or even a fraction of the represented quantity per shift. J.A. 92-93.

Although a new general manager was hired after Mr. Landreth signed the consulting agreement, Mr. Landreth remained active in the management of Landreth Timber's operations.[9] Indeed, he informed the employees that he still owned the business and that Messrs. Bolten and Dennis only had contributed additional financing to complete reconstruction. R. 148, 2-4. Mr. Landreth continued to confer in and implement decisions for Landreth Timber concerning reconstruction of the sawmill and expenditures for equipment acquisitions and maintenance. R. 108, 41-43, 46, 58, 131-32. He also participated in the

[9] Apart from the hiring of a general manager to replace Mr. Landreth, the company's key personnel remained the same. After the 1977 fire Mr. Landreth had kept his key personnel, including his plant manager who had been with him for many years. These people, he assured the investing group, were competent, experienced and could satisfactorily run the new operation on a two-shift basis. J.A. 87; R. 148, 4-5.

bidding for, and acquisition of, timber contracts. R. 108, 46. When confronted by the extent to which the actual cost of reconstructing the mill exceeded his representations, he responded "I sold stock. I didn't sell anything else." R. 108, 91. Mr. Landreth's consulting contract was terminated in January when the extent and materiality of his misrepresentations became known. J.A. 90-91; R. 148, 4.

After the closing, Messrs. Bolten and Dennis' involvement in Landreth Timber was to advance additional funds in an attempt to complete the reconstruction of the mill. J.A. 93; R. 148, 2. When it became apparent that the company could not finance the construction overruns and operating deficits resulting from Mr. Landreth's failure to disclose the true state of reconstruction, and from the remaining capital expenditures and defects in the equipment, the general manager apprised the shareholders of the cost overruns, the worsening financial situation and requested their financial assistance. R. 148, 2; R. 108, 81-82. Because Messrs. Dennis and Bolten personally advanced over $635,000 and guaranteed approximately $2 million in new bank loans, they requested that the general manager consult with them concerning the expenditure of those funds. J.A. 93; R. 148, 2.

By July 1978 the shareholders could no longer continue to pay for the losses and cash-flow deficits. J.A. 93-94. Incapable of profitable operation, the sawmill was transferred to the Tonasket Timber Company and Landreth Timber Company closed its doors. J.A. 94. The sawmill eventually was foreclosed upon at a sheriff's sale. J.A. 94.

Landreth Timber Company sued within one year of the stock transaction, seeking damages of $2,500,000 for violations of the federal securities laws.[10] Specifically,

[10] The common stock of the original Landreth Timber had been acquired for $3,953,095. In its complaint, as amended, petitioner alleged violations of Sections 12(1), 12(2) and 17(a) of the Secu-

Landreth Timber alleged that it was entitled to rescind its purchase because the respondents had widely offered and then sold the shares without registration, in violation of the Securities Act of 1933, and negligently or intentionally had made misrepresentations, or omitted to state material facts. J.A. 23-36, 37-50.

After more than two years of discovery, the filing of notices of 37 depositions, production of voluminous documents, responses to interrogatories and requests for admission, J.A. 1-7, the Landreths moved for summary judgment asserting that, because the petitioner had purchased 100 percent of the stock of Landreth Timber, it had not purchased a "security." J.A. 78; R. 68, 11-12. The petitioner cross-moved for summary judgment asserting that the Landreths had violated the provisions of §§ 5 and 12(1) of the 1933 Act, 15 U.S.C. §§ 77e and 77*l*(1), by failing to register the security they had offered widely for sale. R. 115, 1.

The District Court granted the respondents' motion, Pet. A. 12a-13a, and dismissed for lack of federal question jurisdiction. J.A. 343. Although the court found that the common stock purchased "possessed the ordinary characteristics of stock," Pet. A. 13a, it held that the common stock was not a "security." Applying the test to define an "investment contract" developed in *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), the court held that the sale of Landreth Timber did not qualify as an "investment contract." Pet. A. 19a.

The United States Court of Appeals for the Ninth Circuit affirmed. Recognizing that "[w]hether sale of 100 percent of the stock of a closely-held corporation is a transaction involving a 'security' has divided the circuits and commentators," Pet. A. 5a (footnote omitted), and was a question of first impression in the Ninth Circuit, Pet. A. 6a, the court held that the stock was not a "security." Pet. A. 8a-9a. The court concluded that earlier decisions in which it had adopted the so-called "risk capital test" to determine whether a note was a "security," required that it focus on the transaction rather than the instrument. Pet. A. 6a-7a. Applying its analysis, the court concluded that because the transaction was a "sale-of-business" rather than "a contribution of risk capital subject to the entrepreneurial or managerial efforts of others," the federal securities laws were inapplicable. Pet. A. 7a.

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rities Act of 1933, 15 U.S.C. §§ 77*l*(1) and (2) and 77q(a) and Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b). Landreth Timber also raised pendent claims under the laws of the State of Washington. The District Court dismissed those claims for lack of jurisdiction after it dismissed the federal securities law claims to which they were appended.

SUMMARY OF ARGUMENT

The appropriate starting point for determining whether shares of stock in a conventional business corporation are "securities" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934 is the plain language of the definitional sections of those Acts. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). Their plain language specifically includes "stock," and the common stock at issue here, as the courts below found, possessed all of the characteristics this Court has held to be ordinarily associated with stock. *See, e.g., United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851 (1985). Accordingly, there is no warrant for excluding these shares of ordinary common stock from the coverage of the federal securities laws.

The Court of Appeals' ruling that the common stock of Landreth Timber was not a "security" because one hundred percent of the shares were exchanged cannot be justified by any variant of the so-called "sale of business doctrine." That doctrine depends largely upon construing the "unless the context otherwise requires" clause, preceding the definitional sections of the federal securities laws, to permit courts to examine the *factual* "context" of

individual transactions, as opposed to the *statutory* context, to determine whether the federal securities laws apply to even the most common and typical instruments. That construction of the clause is wrong because it contradicts the plain meaning of the words of the clause, produces illogical results when applied to the other definitional sections it precedes, is inconsistent with the legislative history of the clause, and attributes a meaning to the clause different from its meaning in the numerous other federal statutes containing that clause.

Exempting this transaction from the federal securities laws, as the courts below did, also is inconsistent with the carefully crafted structure of the federal securities laws. When, for example, Congress intended to exempt a transaction from some aspect of the securities laws it did so explicitly, but left the transaction and the securities involved in it subject to other provisions of the 1933 and 1934 Acts. The judicially created "sale of business" exemption, however, abandons that precise approach and exempts a type of transaction from all of the Acts' requirements without so much as mentioning the transaction, much less attempting to define it.

The Ninth Circuit and other courts adopting the "doctrine" have misread this Court's decisions. This Court consistently has applied a two-part test to determine whether an instrument is a "security." Recognizing that settled canons of construction require that the specifically named, typical instruments such as "stock" have a meaning separate from the definition created for the atypical instrument known as an "investment contract," this Court first has examined the instrument to see whether it has the characteristics traditionally associated with its name. *Forman*, 421 U.S. at 848-51. Only when an instrument neither claims to be, nor actually is, one of the instruments specifically enumerated in the 1933 and 1934 Acts has the Court applied the test developed in *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943), and

SEC v. W.J. Howey Co., 328 U.S. 293 (1948), for determining whether an instrument is an investment contract.

Finally, adopting the "sale of business doctrine" as a test upon which federal jurisdiction depends is unwise. Jurisdiction should be determined by precise statutory conditions, not wide ranging inquiries into extrinsic facts. *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934). But determining whether "control" has been transferred, and to whom, is a complicated legal and factual inquiry. Moreover, the doctrine's reliance upon a supposed distinction between "entrepreneurs" and "investors" requires courts to make a distinction even the proponents of the doctrine recognize to be "fuzzy." *Sutter v. Groen*, 687 F.2d 197, 202 (7th Cir. 1982). The supposed distinction not only has no meaning, but its resolution requires an analysis of the subjective intent of the purchaser.

For these reasons, as more fully discussed below, the Ninth Circuit's judgment must be reversed.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTORY LANGUAGE OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934 REQUIRES THAT SHARES OF STOCK IN A CONVENTIONAL BUSINESSS CORPORATION BE TREATED AS "SECURITIES" WITHIN THE MEANING OF THE FEDERAL SECURITIES LAWS.

"The starting point in every case involving construction of a statute is the language itself." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979), *quoting Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, Jr., concurring).[11]

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[11] *See also* Chiarella v. United States, 445 U.S. 222, 226 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979);

Just this term this Court reaffirmed that

> only the most extraordinary showing of contrary intentions from [the statutory history] would justify a limitation on the "plain meaning" of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete "except in rare and exceptional circumstances."

Garcia v. United States, 53 U.S.L.W. 4016, 4017 (U.S. Dec. 10, 1984), *quoting TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978), *quoting Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). Those "rare and exceptional circumstances" exist only where the plain meaning produces an "absurdity" which is "so gross as to shock the general moral or common sense" and there is tangible evidence "to make plain the intent of Congress that the letter of the statute is not to prevail." *Crooks*, 282 U.S. at 60.

That some now desire that Congress had written a different statute cannot alter the statute Congress wrote, for a statute

> "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present day tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Considerations of this kind are for the Congress, not the courts.

National Broiler Marketing Association v. United States, 436 U.S. 816, 827 (1978). Here, the language of the statutes is clear and unequivocal and no "rare and exceptional" circumstances exist to justify ignoring the plain intent of Congress.

The definitional sections of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1982) ("the 1933 Act"), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1982) ("the 1934 Act"), both define a "security" to include "stock."[12] 15 U.S.C. § 77b(1); 15 U.S.C. § 78c(a)(10). Similarly, Congress specifically included "stock" in its definition of a "security" in later enacted statutes regulating securities and securities transactions.[13] As the Fifth Circuit has noted, stock "represents to many people, both trained and untrained in business matters, the paradigm of a security." *Daily v. Morgan*, 701 F.2d 496, 500 (5th Cir. 1983). Stock is, as Professor Louis Loss has written, "so quintessentially a security as to foreclose further analysis." L. Loss, Fundamentals of Securities Regulation 212 (1983).

No one, least of all the courts below, has suggested that the shares of Landreth Timber stock sold by Mr. Landreth and his sons do not "on their face . . . answer to the name or description" of stock or do not have all of "the characteristics 'that in our commercial world fall within the ordinary concept of a security.'" *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851 (1975), *quoting* H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933). This Court has listed the "characteristics traditionally associated with stock." *Forman*, 421 U.S. at 851. "[T]he most common feature of stock [is] the right to receive 'dividends contingent upon an apportionment of profits,'" *id.*, *quoting Tcherepnin v. Knight*, 389 U.S. 332, 339 (1967), and "the other characteristics traditionally associated with stock" are the ability to negotiate, pledge or hypothecate the shares, the right to vote in proportion to ownership, and the prospect of appreciation in value. *Forman*, 421 U.S. at 851.

Sante Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977); Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 24 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976).

[12] Both sections define a "security" to include:

> any note, stock, treasury stock, . . . preorganization certificate or subscription, transferable share . . . or, in general, any interest or instrument commonly known as a "security" . . . .

[13] *See* Public Utilities Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1982) at § 79b(16); Investment Company Act 1940, 15 U.S.C. §§ 80a-1 *et seq.* (1982) at § 80a-2(36); and Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* (1982) at § 80b-2(18).

The shares of Landreth Timber had all of those characteristics and the district court correctly determined that they "possessed all the ordinary characteristics of stock." [14] Consequently, the plain meaning of the definitional sections of the federal securities laws commands that those shares are "securities."

II. NEITHER THE PREFATORY "UNLESS THE CONTEXT OTHERWISE REQUIRES" CLAUSE NOR THE STRUCTURE, LEGISLATIVE HISTORY OR UNDERLYING POLICIES OF THE FEDERAL SECURITIES LAWS PERMITS ENGRAFTING THE "SALE OF BUSINESS DOCTRINE" ONTO THE PLAIN WORDS OF THE STATUTE.

Those who seek to exclude typical, garden variety common stock from the definition of security have done so by adopting the "sale of business doctrine." *E.g., Canfield v. Rapp & Sons, Inc.*, 654 F.2d 459, 465-66 (7th Cir. 1981). Courts adhering to the "doctrine" purport to find their justification in two places. First, they contend that the clause preceding each of the definitional sections—"When used in this chapter, *unless the context otherwise requires*"—grants to courts a roving commission to rewrite those definitional sections if the factual context, not the statutory context, moves them to do so. Second, they misread this Court's previous decisions to impose

[14] Pet. A. 13a. Because those shares had all the attributes of "stock," Mr. Landreth sought to obtain the favorable tax treatment provided by the Internal Revenue Code for sales of stock. *See, e.g.*, I.R.C. §§ 1245, 1250. Indeed, it was for this reason, among others, that the Landreths insisted that the transaction be effected by the sale of stock. Having obtained the benefits of treating the transaction as a sale of stock under one federal law, the Landreths now anomalously argue that the transaction should not be treated as a sale of stock for the purpose of another federal law. But nothing in the definitional sections of the Internal Revenue Code suggest any intent to employ a definition of "stock" or "security" different from the federal securities laws. *See* 25 U.S.C. §§ 7701(7), 3821(c)(1), and 1236(c).

the test formulated for the atypical instrument of an investment contract upon all securities. Neither justification withstands analysis.

A. The Prefatory "Unless the Context Otherwise Requires" Clause Does Not Permit a Court To Rewrite the Plain Language of the Acts. Neither the Structure of the Definitional Sections, Their Legislative History, nor Congress' Use of That Clause in 43 Other Statutes Permits the Construction Some Courts Have Given That Clause.

The first court of appeals to adopt the "sale of business doctrine" advanced the prefatory language appearing in 15 U.S.C. §§ 77b(1) and 78c(a)(10)—"When used in this subchapter, unless the context otherwise requires"—as a principal justification for exempting some transactions in common stock from the provisions of the 1933 and 1934 Acts. *Frederiksen v. Poloway*, 637 F.2d 1147, 1150 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981). In *Frederiksen* the court contended that Congress qualified the definition of "security" by the inclusion of this clause. It misread "context" to mean the factual circumstances surrounding a particular exchange instead of the "context" of the statute. Under this analysis, the federal securities laws do not apply to stock, that is a security in all other instances, if the "context" reveals that the sale of stock has effected a change in the control of the entity whose shares were transferred. That construction is contrary to the structure and legislative history of the definitional section of the Acts.[15]

[15] This Court first discussed the "unless the context otherwise requires" clause in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). There, the Court noted that the prefatory clause represented a Congressional recognition "that the same words may take on a different coloration in different sections of the securities laws." *Id.* at 466. Respondents may argue that the reference to the clause in *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982), suggests a different meaning. But there the Court was addressing the question whether an instrument "not specifically excluded" from the definitions—a certificate of deposit in a federally regulated bank—

The "context" to which Congress referred in the prefatory clause was the "context" of the statute. No "sale of business" court has yet attempted to explain how its interpretation of the clause can be applied to the other 15 definitions in the 1933 Act and 40 definitions in the 1934 Act which the prefatory clause precedes. They have not explained the factual "context" or "economic realities" which might appropriately be examined to determine whether, for example, "[t]he term 'Commission' means the Securities and Exchange Commission," in 15 U.S.C. § 77b(5) or 15 U.S.C. § 78c(a)(15), or "the term 'State' means any State of the United States" in 15 U.S.C. § 78c (a)(16). Nor is it apparent why, for example, Congress would meticulously define the term "bank" in 15 U.S.C. § 78c(a)(6) if a court, guided by its then current view of the appropriate definition of a "bank" in the particular factual "context" it was analyzing, could hold that "a banking institution organized under the laws of the United States" was *not* a "bank".

If the 73d Congress had intended to grant the power to the courts to modify the Acts' statutory definitions as the "context" of the "economic realities" might suggest,[18] so unusual a legislative intent would, at a minimum, have been the focus of some comment in the legislative process. However, the legislative history of the clauses demonstrates that the Congress possessed no such unusual thought.

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was a security. The Court held that the nature of the instrument, and the substantial statutory scheme of regulation associated with it, made the certificate of deposit less like "ordinary shares of stock and 'the ordinary concept of a security,'" than instruments which were securities. *Id.* at 557. As in its earlier cases, the Court analyzed the nature of the instrument, not the transactional "context" in which it appeared.

[18] This is a doubtful proposition given the prevailing tensions at that time. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

As introduced in both the House and the Senate, and as passed by the Senate, the 1933 Act contained the phrase "unless the *text* otherwise *indicates*" where the phrase "unless the *context* otherwise *requires*" now is found. H.R. 5480, 73d Cong., 1st Sess. 39 (1933) (emphasis added) (as enacted by the Senate on May 10, 1933); S. 875, 73d Cong., 1st Sess. 1 (1933). The final House version, however, was altered when the House Committee on Interstate and Foreign Commerce substituted, without comment, "unless the *context* otherwise *requires*" for "unless the *text* otherwise *indicates*." *See* H.R. 5480, 73d Cong., 1st Sess. (1933) (as enacted by the House on May 5, 1933) (emphasis supplied). The "context . . . requires" version ultimately was adopted by the House-Senate Conference Committee.

While the Conference Committee Report includes a discussion of the *significant* distinctions between the definitional subparts employed by the House and Senate, it omits *any* mention of the "text" to "context" shift. *See* H. Conf. Rep. No. 152, 73d Cong., 1st Sess. 24-29 (1933). If the House version sanctions the broad exemptive authority the proponents of the "sale of business doctrine" purport to find, while the Senate version does not, surely "the conferees . . . would at least have remarked upon so important a subject." *Ruefenacht v. O'Halloran*, 737 F.2d 320, 331 (3d Cir.), *cert. denied sub nom. Gould v. Ruefenacht*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984). The Conferees' failure to remark signifies that both the "text" and the "context" to which the two legislative bodies "referred was obviously the context in which the defined words appear in the statute itself." *Id.* at 26.

Congress' failure to comment is readily understandable. Our research discloses no statute which uses the "unless the text otherwise indicates" language. On the other hand, the "unless the context otherwise requires" clause was a phrase Congress frequently had used before,

and repeatedly would use again. These precise words are contained in the definitional sections of at least 36 federal statutes.[17] Congress surely did not intend that the "context" of anything other than the statute be consulted to determine whether, in construing the Migratory Bird Conservation Act of 1929, 16 U.S.C. §§ 715 *et seq.* (1982), "the word 'take' shall be construed to mean pursue, hunt, shoot, capture, collect, kill, or attempt to pursue, hunt, shoot, capture, collect or kill," 16 U.S.C. § 715n, or to determine whether "the term 'Commission' means the Federal Communications Commission" in the Communications Satellite Act of 1962, 47 U.S.C. § 702(10) (1982). Yet the definitional section of each of those acts, and at least 34 others, contain the same "unless the context otherwise requires" clause found in the federal securities acts, and Congress presumably intended identical statutory language to have a consistent meaning. *Cannon v. University of Chicago*, 441 U.S. 677, 694-99 (1979). That requirement of a consistent meaning precludes an interpretation of the clause that authorizes a wide ranging inquiry into all of the economic and business circumstances surrounding the sale of an ordinary, typical share of stock.

B. Neither the Structure of the Acts nor Their Legislative History Permits Engrafting the "Sale of Business Doctrine" upon the 1933 or 1934 Acts.

Not only does the "sale of business doctrine" find no support in the "unless the context otherwise requires" clause, but imputing a broad exemptive authority to that clause offends the carefully crafted structure of the Acts. When Congress chose to exempt a specific instrument, or a specific transaction, from the full range of the securities laws, it did so explicitly and precisely.

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[17] Because the number of currently effective statutory provisions which use these words is so great, they are listed in Appendix B to this Brief.

Each exemption Congress created from the securities laws has different, and carefully considered, consequences. The 1933 Act, for example, contains one section describing "exempted securities" and another describing "exempted transactions." 15 U.S.C. §§ 77c, 77d. "Exempted securities" include certain government securities, notes arising out of current transactions, and securities issued by banks, as well as securities issued in offerings under $5,000,000 and exempted pursuant to regulations adopted by the SEC. But even as to those "exempted securities," Congress took pains to specify which of the provisions of the Securities Act would be applicable to these "exempted securities," and which would not. *See* 15 U.S.C. § 77q(c). Thus, although "exempted securities" are removed from the Act's registration requirements, the antifraud prohibition of Section 12(2) is applicable to them. Similarly, when Congress exempted certain *transactions* from the Act's registration requirements, 15 U.S.C. § 77d, it left those transactions (and the securities that figure in them) subject to all the Act's other provisions.

The "sale of business doctrine" imputes to Congress an intent to abandon this precise approach. The "doctrine" exempts a transaction from *all* of the Acts' requirements, without any reference to the transaction or the instrument in the Act, and provides no clue as to the manner in which an instrument which is the prototype of a security became a non-security.[18]

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[18] Indeed, the "doctrine" is so lacking in precision that it seems inevitably to lead to the conclusion that the same shares of stock can be a "security" as to one party in a transaction, and not to another party in the same transaction. *Cf.* Siebel v. Scott, 725 F.2d 995 (5th Cir.), *cert. denied*, 52 U.S.L.W. 3891 (U.S. June 11, 1984). For example, a buyer owning a percentage of the stock insufficient to provide control (or 100% of the stock, whichever may be the test) may purchase sufficient shares to achieve control (or 100% ownership) from a single shareholder lacking control. The buyer has, therefore, acquired the "control" upon which the doctrine is predicated. Presumably, the "doctrine" would dictate that the buyer could not bring an action under the federal securities laws, because

When Congress desired to exempt a transaction from the 1933 and 1934 Acts it demonstrated no difficulty in doing so with precision.[19] Congress did not leave the task to judicial creativity. Congress' failure to include transactions involving sales of control among the transactions specificially made exempt further underscores the impropriety of judicially creating such an exemption.

Engrafting the "sale of business doctrine" upon the Acts does more than offend their pattern of exemptions. It threatens to repeal substantive provisions of the Acts. The Williams Act, incorporated into the 1934 Act, was designed to comprehensively regulate public tender offers. By its terms it is clearly intended to apply to a tender offer for all the common stock of a corporation, a transaction which would result in the transfer of control. But the Williams Act depends for its definitions on the definitional provisions of the 1934 Act, including the definition of "security." One of the principal provisions of the Williams Act makes it unlawful for any person to make a tender offer for "any equity *security*" registered under the Exchange Act without filing a disclosure statement with the SEC. 15 U.S.C. § 78m(d)(1) (emphasis supplied). Another provision defines a "person" for this purpose to be any "group" formed "for the purpose of acquiring, holding, or disposing of *securities* of an issuer." 15 U.S.C. § 78m(d)(3) (emphasis supplied). It is illogical to assume that Congress would have chosen to define "group," an important term of the statute, in terms of a "security" if it had thought that, in attaining "control," the group would not be (and perhaps never had been) purchasing "securities."[20]

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the presence of control makes the stock not a "security." The "doctrine," however, would appear to dictate that the seller of the same stock sold a "security" and therefore enjoys the protection of the securities laws.

Nowhere in the definition of "security," or in the structure of either the 1933 or the 1934 Act, is there the slightest hint that Congress intended its definitional section to produce such variable and asymmetrical results. A definition characterizing the same instrument as one thing to one party and something else to another —*in the same transaction*—is a prescription for confusion, not a definition.

[19] In addition to the exemptions in the 1933 Act discussed above, the 1934 Act also includes a number of exemptions and authorizations to grant exemptions that relate to particular securities and particular transactions. *See, e.g.*, §§ 3a(12), 12(g)(2), 13(d)(6), 14(d)(8) and 16(b), 15 U.S.C. §§ 78c(a)(12), 78*l*(g)(2), 78*l*(h), 78m(d)(6), 78n(d)(8) and 78p(d) (1982).

The legislative history of the 1933 Act also demonstrates that the Ninth Circuit acted contrary to the intent of the Congress in exempting this transaction. On the occasion when Congress considered the sale of all the shares of stock in a corporation by a single (or small group of) shareholders, it clearly expressed its intent that the transaction be covered:

> All the outstanding stock of a particular corporation may be owned by one individual or a select group of individuals. At some future date they may wish to dispose of their holdings and to make an offer of this stock to the public. Such a public offering may possess all the dangers attendant upon a new offering of securities.

H.R. Rep. No. 85, 73d Cong., 1st Sess. 13-14 (1933). In the face of that declaration, the judicial creation of an exemption for the sale of shares of a closely-held corporation "by one individual or select group of individuals" cannot be justified.

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[20] Examples of the interpretive conundrums created by imposing this "doctrine" on statutes to which it has been a stranger for fifty years are limitless. If a 49 percent stockholder acquires one percent, has *he* purchased a "security"? What if he acquires two percent? If the owner of all the stock sells it to one buyer, the doctrine says he has not sold a "security." But suppose he sells it to several buyers? Has he engaged in a "securities" transaction if he sells "control" in a public offering?

C. In Adopting the "Sale of Business Doctrine" the Court of Appeals Misinterpreted This Court's Decisions and Erred in Applying the "Investment Contract Test" as the Test Applicable to All Securities. The "Investment Contract Test" Is Applicable Only to Atypical Instruments, and Should Not Be Employed to Render the Same Instrument Both a Security and a Non-Security at the Same Time.

For more than forty-five years after the 1933 Act was enacted, no court appears to have questioned the proposition that common stock of a conventional business corporation was a "security" in whatever transaction it appeared. This Court and others had recognized that the securities laws were designed to protect participants in private, as well as public, transactions. *See, e.g., Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953); *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947).[21]

Indeed, when Landreth Timber's shares were sold, no published opinion of a court of appeals had declared that ordinary common stock was not a "security."[22] Subsequently, courts began to depart from the plain meaning of the statute by the adoption of the "sale of business doc-

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[21] See also 3 L. Loss, Securities Regulation 1467 n.83 (2d ed. 1961) (collecting cases).

[22] This Court recognized in *Forman*, 421 U.S. at 850-51, that the name given to even an unusual instrument is not "wholly irrelevant" precisely because:

> There may be occasions when the use of a traditional name such as "stocks" or "bonds" will lead a purchaser justifiably to assume that the federal securities laws apply. This would clearly be the case when the underlying transaction embodies some of the significant characteristics typically associated with the named instrument.

trine," asserting that they were authorized to do so by decisions of this Court. They were not.

Ten years after the enactment of the 1933 Act, this Court held that the federal securities laws regulated the exchange of certain atypical instruments that, though not specifically enumerated in the Act's definitional section, nevertheless were within the meaning of the section's more generic phrases, such as "investment contract." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 348-55 (1943). In *Joiner*, and every case which followed it, this Court first has looked at the instrument itself to determine whether the definition of a security has been met. Where the instrument is typical and bears the ordinary characteristics of such an instrument, the inquiry is complete. Where the instrument is atypical, this Court has examined the transaction by which the instrument was *created*, to determine whether the instrument was a "security." Significantly, this Court has never focused upon the transaction by which the instrument was *exchanged* after it was created to determine whether it is a "security" within the meaning of the federal securities laws.

While claiming fidelity to this Court's earlier decisions, the Ninth Circuit and other courts adopting the "sale of business doctrine" have employed a radically different analysis. As the "sale of business doctrine" is applied by those courts, the nature of the instrument becomes irrelevant, and shares having all the traditional aspects of stock become non-securities, not because of their nature when created or exchanged but because of the manner of their exchange. And, as the "sale of business doctrine" is applied by those courts, the test for a single type of instrument—"investment contracts"—becomes the test for all securities. That radical departure from this Court's prior decisions cannot be justified.

1. *The Two-Part Test Established by This Court for Determining Whether a Particular Instrument Is a Security Recognizes that Each Instrument Listed in the Definitional Sections of the Federal Securities Laws Has a Separate and Independent Meaning.*

In *Joiner*, the first case in which it interpreted the definitional sections, this Court recognized that the 1933 Act would be redundant, if not nonsensical, if it were read to require that an instrument uniformly recognized as "stock" must also be an "investment contract":

> In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well-settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share," "investment contract," and "in general any interest or instrument commonly known as a security." We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as a matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as a matter of fact that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts," or as "any interest or instrument commonly known as a 'security.'"

Joiner, 320 U.S. at 351. The Court also recognized that each of the investment instruments enumerated in the definitional section of the 1933 Act has a separate meaning and significance and that the proof required to establish coverage of that Act varied with the type of instrument involved:

> It would be necessary in any case for any kind of relief to prove that the documents being sold were securities under the Act. In some cases it might be done by proving the document itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here.

Joiner, 320 U.S. at 355.

Thus, *Joiner* does not even remotely suggest that the test applicable to "investment contracts" should be applied to every investment vehicle. Rather, consistent with *Joiner's* recognition that proof that a "security" is involved may be made by "proving the document itself" if the document is typical or by going "outside the instrument itself" if the document is atypical, this Court uniformly has applied a two-part test to determine whether a given instrument meets the federal securities laws' definition of a "security." Instruments that "on their face" are clearly among those instruments specifically described by the Congress in the Acts are treated as securities as a matter of course. If, for example, an instrument labeled "stock" carries with it the right to receive "dividends contingent upon an apportionment of profits," *Tcherepnin v. Knight*, 389 U.S. 332, 339 (1967), as well as all of the "other characteristics traditionally associated with stock," including negotiability, alienability, voting rights, and the possibility of appreciation in value, *Forman*, 421 U.S. at 851, the analysis ends. *See Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) (categorically stating that "ordinary stocks and bonds" are included in the statutory definition). The "economic reality" of the transaction creating the instrument is examined only if, as in *Joiner* and *Howey*, the instrument in question involves an economic arrangement not readily identified by one of

the statutory appellations, or if, as in *Forman*, the instrument in question has "none of the characteristics 'that in our commercial world fall within the ordinary concept of a security.'" *Forman*, 421 U.S. at 851, *quoting* H.R. Rep. No. 85, 73d Cong., 1st Sess. 11 (1933). And the transaction the Court has examined is the transaction which endows the instrument with the bundle of rights it represents, not the transaction in which it is exchanged. *See Marine Bank*, 455 at 559 n.9 ("We reject respondent's argument that the certificate of deposit was somehow transformed into a security when it was pledged, even though it was not a security when purchased.").[23]

This two-part test, which correctly recognizes that stock and the other listed instruments have a meaning different from "investment contract," is required by well-settled canons of statutory construction. This Court has repeatedly held that every word in a statute is to be

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[23] In determining whether an instrument is a "security," the appropriate focus must be upon the transaction which created the instrument, not every subsequent transaction in which it is exchanged. This Court always has looked to the transaction which created the instrument. *Joiner* and *Howey* were both actions brought by the SEC to enjoin violations of the registration requirements of the Securities Act of 1933, in which the question necessarily was whether the interests in oil leases and orange groves, respectively, were "securities" when they were "issued." *Tcherepnin*, *Daniel*, *Forman*, and *Marine Bank* all involved fraud claims. In each of those cases the plaintiff was the original purchaser of the instrument in question. To the extent the Court found it necessary to examine the "economic realities" of the "transaction," it was obviously the transaction in which the putative security was *issued* that was the relevant one. And in *Marine Bank* this Court explicitly rejected the proposition that the same instrument could fail to be a "security" when created, but become one at some later time. *Marine Bank*, 455 U.S. at 559 n.9. If the Ninth Circuit had been faithful to these cases it would have focused upon the transaction by which the shares were issued to the Landreths, not the transaction in which the Landreths sold them to Messrs. Bolten and Dennis.

given meaning, *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Indeed, just this term, the Court reaffirmed that "[c]anons of construction indicate that terms connected in the disjunctive . . . be given separate meanings." *Garcia*, 53 U.S.L.W. at 4017. Any argument that the definition of an "investment contract" should apply to all of the instruments which are separated from "investment contract" by the disjunctive "or" offends both canons.

The definitional section of the 1933 Act lists seventeen forms of instruments and separates the sixteenth from the seventeenth by the disjunctive conjunction "or." 15 U.S.C. § 77b(15). The 1934 Act lists fourteen instruments, again employing the disjunctive "or." This Court recently declared that such a statutory scheme indicates Congress' "intent to give the nouns their separate, normal meaning," *Garcia*, 53 U.S.L.W. at 4017, thereby giving each word meaning. *Menasche*, 348 U.S. at 538-39. The imposition of *Howey*'s "investment contract test" on every other term in the statutory definition not only deprives those terms of any separate meaning, but also renders them meaningless, and offending both canons.

2. *The Two-Part Test for Determining Whether an Instrument Is a "Security" Is Not Undermined by, but Instead Is Required by,* Howey, Forman, *and Other Decisions of This Court Applying the Definitional Sections of the Federal Securities Laws.*

Both *Howey* and *Forman* are consistent with, and indeed require, the two-part test to determine whether an instrument is a "security." *Howey* considered the sale of land used as citrus groves coupled with a service contract. Recognizing that the lower courts had "treated the contracts and deeds as separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer," *Howey*, 328 U.S. at 297-98, the Court noted that

the term "investment contract" was undefined in the 1933 Act, "but had been broadly construed by state courts" applying state blue sky laws. The Court held that Congress' use of the term "investment contract" in the 1933 Act imported the state definitions so that "investment contract" meant

> a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.

Howey, 328 U.S. at 298-99. Precisely because the concept of an "investment contract" was meant to be "one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," *id.* at 299, it was necessary, as *Joiner* had recognized, to go outside the instrument to determine whether an "investment contract" was present. *Joiner*, 320 U.S. at 355. And, as in *Joiner*, the Court looked to the transaction which created the instrument to determine what attributes it possessed and inducements it offered.

Similarly, in *Forman*, upon which the Ninth Circuit and the other proponents of the "doctrine" rely most heavily, this Court applied the *Howey* "investment contract" analysis only after it concluded that the instrument labeled "stock" was really a refundable, nontransferable deposit on a cooperative apartment lacking any expectation of dividends or a return on the purchase price. Although the Court rejected the suggestion that transactions "evidenced by the sale of shares called 'stock,'" were *automatically* covered by the provisions of the federal securities laws "simply because the statutory definition of a security includes the words 'any . . . stock,'" *Forman*, 421 U.S. at 848 (footnote omitted), it did so

only after a thorough examination of the instruments involved revealed that the only similarity between those instruments and a traditional share of stock was their name.

In a separate section the *Forman* Court considered the alternative basis for the Court of Appeals' holding that the instrument was a "security." The Court of Appeals had held "that a share in [the cooperative apartments] is both 'stock' and an 'investment contract' under the Securities Acts." *Forman v. Community Services, Inc.*, 500 F.2d 1246, 1255 (2d Sir. 1974). It was only in rejecting what this Court labeled the "alternative ground" for the Court of Appeals' decision that the Court proceeded to apply the *Howey* analysis to the claimed "investment contract" before it. *Forman*, 421 U.S. at 851. *Forman*, therefore, stands only for the proposition that courts need not blindly follow a "literalist" approach and permit the name given to an instrument to mask the fact that, for example, a lease deposit has been called "stock." [24]

Ironically, courts adopting the "sale of business doctrine," including the Ninth Circuit in this case through the use of their "risk capital test," have principally relied upon *Forman*.[25] Yet as a number of other federal courts have already concluded, the structure of the *Forman* opinion repudiates the analysis underlying the doctrine:

> [W]e think that *Forman* favors rejection of the sale of business rule. In treating separately the questions

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[24] One court colorfully has recognized the common sense proposition that the name given an instrument cannot control by declaring that "[a] lizard with a sign around its neck reading 'dog' does not change the lizard into a Labrador retreiver." *Slevin v. Pedersen Associates, Inc.*, 540 F. Supp. 437, 440 (S.D.N.Y. 1982).

[25] Pet. A. 7a-9a. *See also* Christy v. Cambron, 710 F.2d 669 (10th Cir. 1983); Sutter v. Groen, 687 F.2d 197 (7th Cir. 1982); King v. Winkler, 673 F.2d 342 (11th Cir. 1982).

> whether the shares at issue were stock or investment contracts, the decision as a whole suggests that as long as an instrument has the typical characteristics of stock, it need not also qualify as an investment contract under the *Howey* test.

Daily v. Morgan, 701 F.2d 496, 499 (5th Cir. 1983). And, most recently, this Court declared that the statutory definitions "*include ordinary stocks and bonds*, along with the 'countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.'" *Marine Bank v. Weaver*, 455 U.S. 551, *quoting Howey*, 328 U.S. at 299 (emphasis supplied).

In this case the Ninth Circuit apparently dismissed as irrelevant the district court's finding that, unlike the "stock" in *Forman*, the shares of Landreth Timber had "all of the characteristics normally associated with stock." Pet. A. 13a. The Ninth Circuit proceeded immediately to the alternative ground of *Forman*, and held that the sale of a controlling number of shares in a corporation is not an "investment contract" and, therefore, the federal securities laws do not apply. Pet. A. 8a-9a. But *Forman* neither held nor suggested that a transaction involving an instrument with all the attributes of traditional stock must also meet the test applicable to "investment contracts." As the Fifth Circuit has noted, this "Court was not [in *Forman*] commanding that the *Howey* criteria apply to all securities, but was merely describing its past decisions, all of which dealt with unusual instruments where the *Howey* test would be applicable." *Daily*, 701 F.2d at 499-500 (footnote omitted).

Courts following the "sale of business doctrine" have misinterpreted this Court's opinions in yet another way. While this Court has held that certain instruments are not "securities," it has never suggested that the same instrument can be a "security" if exchanged in one transaction, but not a "security" if exchanged in another. *See*

Marine Bank, 455 U.S. at 559 n.9. Instead, this Court consistently has asked "what character the *instrument* is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect." *SEC v. United Benefit Life Insurance Co.*, 387 U.S. 202, 211 (1967), *quoting Joiner*, 320 U.S. at 352-53 (emphasis supplied). Only by ignoring the transaction which creates the instrument and focusing on some later exchange can a court create the "now it's a 'security,' now it's not" effect the "sale of business doctrine" produces. As the Second Circuit has recognized, the "doctrine's" focus on the nature of the transaction rather than on the nature of the instrument is contrary to this Court's decisions:

> *Howey*, *Forman* and *Marine Bank* treat the determination of whether a particular instrument is a "security" under the '33 and '34 Acts as one which does not vary from time to time depending upon the relative holdings of the parties or their intentions in a particular transaction. . . . The sale of business doctrine, on the other hand, treats an instrument as a "security" for some purposes but not for others. Whereas prior cases have focused on the nature of the instrument, the sale of business doctrine focuses on the nature of particular transactions involving the instrument.

Golden v. Garafalo, 678 F.2d 1139, 1143-44 (2d Cir. 1982) (citation omitted).

Finally, the Ninth Circuit's belief that it was constrained to apply the "investment contract" analysis because of its earlier decisions involving notes is wrong. This Court has yet to consider whether a "note" with all the usual characteristics of traditional "notes" can ever fail to be a "security" under the federal securities laws. Some courts considering the issue, however, have concluded that some "notes" are covered by the Acts, and some "notes" are not.[26] Whatever may be the

ultimate resolution of the attempt to harmonize the varying bases advanced to exempt some "notes" from coverage, there is no warrant to extend the confusion to "stock." *See generally Ruefenacht*, 737 F.2d at 323-26 (analyzing cases). "Notes," unlike "stock," are a peculiarly broad class of financial instrument, having widely varying terms and conveying variable bundles of rights. As the Third Circuit stated in *Ruefenacht* in the course of explaining its earlier decision in *Lino v. City Investing Co.*, 487 F.2d 689 (3d Cir. 1973) (and providing the distinction between notes and stock the Ninth Circuit lacked):

> [T]here is, as we held in *Lino*, some necessity for fine-tuning the definition of "note" to avoid sweeping within the coverage of section 10(b) of the 1934 Act every consumer and business loan financing current operational costs. But there is no such necessity in the stock area. Stock is a well-defined term, is not issued by consumers, and is not ordinarily employed by business to finance current transactions. While the importation of the *Howey* test into the note arena might be justified as an expedient—albeit an imperfect one—for limiting the definition of "note," no such expedient seems necessary for the issue of stock.

Ruefenacht, 737 F.2d at 325.

In its analysis of the shares of stock acquired by Messrs. Bolten and Dennis, the Ninth Circuit has strayed from the analysis employed in this Court's prior decisions. The Landreth stock concededly carried the usual attributes of instruments so named. The shares at issue entitled Messrs. Bolten and Dennis to "dividends contingent upon an apportionment of profits," *Tcherepnin*, 389 U.S. at 359, voting rights and all of the "other characteristics traditionally associated with stock." *Forman*, 421 U.S. at 851. In these circumstances, *Forman* does not require that a court look behind the name of an instrument specified in the statutes where there is no indication that the instruments are anything "other than what they appear to be." *Coffin v. Polishing Machines, Inc.*, 596 F.2d 1202, 1204 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979). Having been induced by representations of a profitable investment—the inducement normally motivating the purchase of stock—and having purchased ordinary common stock, Messrs. Bolten and Dennis are entitled to the protections provided by the federal securities laws to purchasers of stock.

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[26] *See, e.g.*, Exchange National Bank v. Touche Ross & Co., 544 F.2d 1126 (2d Cir. 1976); Emisco Industries, Inc. v. Pro's Inc., 543 F.2d 38 (7th Cir. 1976); McClure v. First National Bank, 497 F.2d 490 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); Lino v. City Investing Co., 487 F.2d 689 (3d Cir. 1973).

III. THIS COURT SHOULD ENFORCE THE PLAIN MEANING OF THE ACTS AND ADHERE TO ITS PRIOR DECISIONS. THIS COURT SHOULD REJECT THE UNNECESSARY CONFUSION IN THE APPLICATION OF THE FEDERAL SECURITIES LAWS, ILLOGICAL RESULTS, AND BURDENS ON COURTS AND LITIGANTS THAT WOULD RESULT FROM ADOPTING THE SALE OF BUSINESS DOCTRINE.

Application of the "sale of business doctrine," in whatever form it might take, would necessarily require this Court and the courts of appeals to formulate two complex legal standards and then require district courts to engage in two complex factual inquiries to determine whether federal jurisdiction exists. First, pursuant to whatever standard is proposed, the district court would be required to determine whether the stock sold carried with it the power of control. Second, if the "investor"/"entrepreneur" distinction is to be resolved by some principled standard rather than "form," the court must necessarily determine whether the purchaser's intent to exercise that power was sufficient to make him or them "entrepreneurs" rather than "investors." Resting federal jurisdiction on such uncertain foundations is unwise.

In the year the 1934 Act was passed, this Court construed the Ship Mortgage Act of 1920 to determine whether the federal courts had exclusive admiralty jurisdiction to adjudicate mortgage foreclosure suits. The Court declared, in terms equally applicable here:

> If a mortgage is within the Act, there can be no suit to foreclose it in the state court; if the mortgage is not within the Act, there can be no suit for foreclosure in the admiralty. It cannot be doubted that the Congress recognized the importance of basing the jurisdiction, as thus sought to be conferred, upon precise statutory conditions. We find no warrant for leaving it to be tested by extrinsic criteria, raising a host of questions as to the application of the proceeds of loans, in the solution of which the statute affords no aid.

Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934) (footnote omitted). The "sale of business doctrine" invites courts to resolve questions of jurisdiction on just such "extrinsic criteria . . . in the solution of which the statute affords no aid." *Id.*

A. The Determination of the Presence of Even Theoretical Control—the Fundamental Basis for the Doctrine—Is a Complex and Burdensome Legal and Factual Inquiry.

According to the "sale of business doctrine," a transaction effecting change of control is not a transaction in "securities." But the imprecision of the so-called "doctrine" manifests itself when the legal and factual inquiries necessary to make that determination—upon which federal jurisdiction turns—is examined.

Perhaps the only aspect of the "doctrine" as to which even a surface level agreement exists among its proponents is that a transaction involving the sale of all the common stock of a corporation is not a transaction in "securities." But even at that level the doctrine produces confusion, and conflicts with its own rationale.

Limiting the doctrine to the sale of 100% of the shares makes no analytical sense. Only the form, not "economic realities," change if the purchaser ritualistically insists the seller retain a single share. Accordingly, the rationale of the "doctrine" has led some courts to declare that it must apply to all sales of any "controlling" interest in a business. *See, e.g., Sutter v. Groen*, 687 F.2d 197, 203 (7th Cir. 1982). *See also Christy v. Cambron*, 710 F.2d 669, 672 n.1 (10th Cir. 1983); *King v. Winkler*, 673 F.2d 342, 346 (11th Cir. 1982). *Cf. Daily v. Morgan*, 701 F.2d 496, 503 (5th Cir. 1983); *Golden v. Garafalo*, 678 F.2d 1139, 1145-46 (2d Cir. 1982).

But if the "doctrine" is true to its roots and applies to any transaction in which a "controlling" interest is sold, the courts will be required to determine, on a case by case basis, whether control has been transferred. In even the seemingly easiest cases—when all of the stock changes hands in a single transaction—questions will remain. Ownership of all of the voting stock of a corporation does not necessarily convey immediate "control." Most state corporation statutes, for example, authorize the election of director for staggered terms of greater than one year. *E.g.*, Del. Code Ann. tit. VIII § 141(d) (1984); H. Henn and J. Alexander, Laws of Corporations and Other Business Enterprises, 556-57 (3d ed. 1983). In such a corporation, unless the shareholders are permitted to remove directors without cause (which is not always possible, *see* H. Henn and J. Alexander at 559), a person who acquires 100 percent of the stock of a corporation may not be able actually to assume working control for a period of more than a year.

The problem becomes far more difficult when less than all the stock is acquired. While holdings of over 50 percent usually convey the power to elect the entire board of directors, and thus to control the day-to-day operations of a corporation, this is not always the case. Provisions for cumulative voting, class voting, "staggered" boards

of directors and the like are often used in close corporations (and even occasionally in more widely-held ones) to limit the power or control of a majority shareholder. *See* H. Henn & J. Alexander, Laws of Corporations and Other Business Enterprises 719-22 (3d ed. 1983); F. H. O'Neal, Close Corporations §§ 3.14, 3.23 (1971). *See also Atlantic Properties, Inc. v. Commissioner*, 519 F.2d 1233 (1st Cir. 1975) (supermajority voting requirement for board action prevented effective action by board on dividends).

Such limitations are particularly common with respect to major actions that cannot be taken by the board of directors acting alone. Some state statutes require votes of an extraordinary majority (usually two-thirds) of the shareholders to accomplish certain transactions, such as mergers, amendments to the articles of incorporation, or sales of assets. *E.g.*, Del. Code Ann. tit. VIII § 102(b)(4) (1984). And the recent popularity of so-called "shark-repellent" provisions in the charters of publicly-held corporations have made such provisions increasingly common in the articles of public companies. *See* A. Fleischer, Tender Offers: Defenses, Responses and Planning (1983); M. Lipton and E. Steinberger, Takeovers & Freezeouts 265-71 (1978).

Conversely, in corporations in which the shares are widely dispersed, holdings of substantially less than fifty percent of the stock are sufficient to convey "working control." *See Essex Universal Corp. v. Yates*, 305 F.2d 572, 578-79 (2d Cir. 1962) (panel majority assumes "28.3 percent of the voting stock of a publicly-held corporation is usually tantamount to majority control . . . ."); *see also Sutter v. Groen*, 687 F.2d at 203; Sommer, *Who's "In Control?"—SEC*, 21 Bus. Law. 559, 569 (1966) (less than 10 percent may be sufficient for control). Courts have recognized that it is extremely difficult to make such a determination.

> The existence of [control] will depend not merely on the proportion of the stock held by the seller, but on many other factors—whether the other stock is widely or closely held, how much of it is in "street names," what success the corporation has experienced, how far its dividend policies have satisfied its stockholders, the identity of the purchasers, the presence or absence of cumulative voting, and many others.

Essex Universal Corp. v. Yates, 305 F.2d at 582 (Friendly, J., concurring).

At the very least, the trial court would have to conduct a complex and extensive hearing just to determine whether a sale of "control" occurred, an issue on which the court's jurisdiction will turn. And even that inquiry may not ultimately be successful. As Judge Friendly recognized in *Yates*:

> Often, unless the seller has nearly 50% of the stock, whether he has "working control" can be determined only by an election; groups who thought they had such control have experienced unpleasant surprises in recent years.

Id. at 582.

When the present case, involving the ultimate transfer of 100% of Landreth Timber's stock, is analyzed according to the "economic realities," an apt example of the complexities in determining the existence of control is presented.[27]

In the securities laws, as in other areas of the law, a transaction involving a series of intermediate steps is properly analyzed by collapsing the formal, intermediate steps, and analyzing the completed transaction. *See, e.g., Dobson v. Commissioner*, 320 U.S. 489 (1943);

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[27] Despite the fact that it was deciding a case of "first impression," the Ninth Circuit declined to permit Mr. Dennis and Mr. Bolten's estate, the two major shareholders, to intervene. Pet. A. at 10a. That decision permitted the court to avoid analyzing the issue of control according to the "economic realities."

Waterman Steamship Corp. v. Commissioner, 430 F.2d 1185 (5th Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); SEC v. Culpepper, 270 F.2d 241, 248 (2d Cir. 1959).[28] Viewed from that perspective, the transaction involved here resulted in Messrs. Bolten and Dennis acquiring 85% of the equity of Landreth Timber and 100% of the voting stock. Six others acquired the remaining 15% of the equity, without voting rights. Messrs. Dennis and Bolten each acquired 50% of the voting shares. Thus, neither had "control." To determine who had control, can a court conclusively presume that each shareholder would always vote as the other would? What sorts of disputes should a court hypothesize in predicting how a dispute would arise and be resolved—dividend policies, capital investment, or a re-"sale of the business?" Should it be open for Mr. Dennis or Mr. Bolten to contend that he was a passive "investor" expecting his partner to be an entrepreneur exercising control? Should such an inquiry be determined by each man's testimony concerning his subjective intent to be passive while his partner was active? Can that intent change as, for example, when the current employees reveal themselves to be unable to manage the business capably? In a case where a jury trial is demanded should a jury decide? Should the issue of jurisdiction be consolidated with the trial on the merits, or should full blown discovery be taken on this limited issue with, for example, repetitive depositions on the merits? If the fraud were sufficiently egregious to invoke the criminal penalties of the securities laws, would a seller's guilt turn on each *victim's* intent?

Surely a doctrine whose centerpiece is "economic reality" would embrace each of those inquiries. Equally

[28] The SEC's rules also take this approach. For example, Rule 501 provides that in counting the number of purchasers to determine whether an offering is exempt from registration, a corporation is not counted as a single purchaser if it was organized to acquire the securities. Instead, the rule requires that the corporation be ignored and its shareholders counted individually. 17 C.F.R. § 230.501 (1984).

surely, those inquiries would deprive the "doctrine" of any utility as an aid to a court determining its jurisdiction.

In short, not only is it not clearly established what is meant by "control" in applying the "sale of business doctrine," even if a test can be agreed upon, its application will often call for a complex and perhaps lengthy factual inquiry.

B. Examining the Subjective Intent of the Purchaser To Determine Whether They Should Be Classified as an Investor or an Entrepreneur Is an Equally Uncertain and Unrewarding Enterprise.

The second element in the "sale of business doctrine" is apparently the intent of the purchaser. As the Seventh Circuit, the principal architect of the "doctrine," put it:

> [T]he key to defining the scope of the securities laws is whether the transaction is primarily for commercial (i.e., motivated by a desire to use, consume, occupy or develop), or for investment purposes.

Frederiksen, 637 F.2d at 1150. *See also Sutter*, 687 F.2d at 202-03.

But other courts correctly have recognized that the basis for this subjective (and apparently determinative) distinction between "investment" intent and "entrepreneurial" intent is not readily apparent.

> Just why investors who choose to engage in entrepreneurship in order to improve the performances of their investment cease to be "investors," and become instead exclusively "entrepreneurs," is something of a mystery.

Ruefenacht, 737 F.2d at 334; *see also* Note, *Repudiating the Sale-of-Business Doctrine*, 83 Colum. L. Rev. 1718, 1738-39 (1983).

Even the Seventh Circuit has recognized that the distinction between an investor and an entrepreneur is often "fuzzy." *Sutter*, 687 F.2d at 202. Indeed, that court has recognized that "[s]ometimes a person is both at once." *Id.* at 201. However, the "doctrine" is ap-

parently rooted in the notion that the securities laws were intended to protect "investors" but not "entrepreneurs," or those who purchase for "commercial" reasons, and prides itself on an ability to match the legal result to "economic realities." *See, e.g., Frederiksen*, 637 F.2d at 1150 (7th Cir. 1981). Yet a "doctrine" which applies to all purchasers of 100% of the stock sweeps within its orbit cases in which the purchaser is in economic reality truly an "investor"—one who neither intends, nor is able, to exercise his theoretical power to actively control the business, but instead seeks a profitable investment in a going concern in which he intends to rely on the managerial skills of others.

The present case aptly illustrates this flaw in the "doctrine" and the Ninth Circuit's error in affirming summary judgment. By any test of "economic realities," the real purchasers are Mr. Bolten, an 84 year old retired businessman, Mr. Dennis, a 67 year old attorney, and six others. The operations of Landreth Timber Company were in Tonasket, Washington. Mr. Bolten lived in Florida, and Mr. Dennis lived in Florida and Boston. They were motivated by representations concerning the profitability of an investment which they would not be required to operate. Neither had any experience in the operation of a lumber mill and neither intended to make a radical career change to become a lumberman. Instead, they made their purchase in reliance on the existing management of the company and insisted that Ivan K. Landreth accept a consulting agreement to assist in the transition. He was in fact left with so much practical power over the affairs of the company that he was able to boast that he continued to own the company and that Messrs. Bolten and Dennis merely contributed additional funds to complete reconstruction. R. 148, 2-3. To call Messrs. Bolten and Dennis "entrepreneurs" rather than "investors" is surely to exalt form over substance and to deprive the word of any useful meaning.

And, of course, any factual determination concerning a purchaser's intent is further complicated by the fact

that the purchaser's intent may change over time. Surely there is no basis in the facts or record to conclude that Messrs. Bolten and Dennis contemplated earning their living from a business in which they had no experience and which was 3,000 miles from their homes. That circumstances required them to become involved in an attempt to avoid the debacle of a foreclosure sale scarcely makes them "entrepreneurs." But if it does, can it mean that securities law claims which would have been valid had they remained passive are extinguished by efforts to minimize the damage suffered?

The Ninth Circuit avoided economic reality and held that the presence of theoretical "control" meant Messrs. Dennis and Bolten were not investors. The Seventh Circuit, on the other hand, has responded by creating a set of presumptions to assist in the resolution of the issue of the purchaser's intent. See *Sutter*, 687 F.2d at 203. Respondent may offer these presumptions in an effort to escape this thicket. But there is even less basis in the statutory language or legislative history for such judicially created presumptions than there is for the proposition that the sale of stock to one who intends to exercise control is not a "securities" transaction. The need to fashion such a set of presumptions only illustrates how far adrift the doctrine is from any statutory anchor. Surely, as this Court said only last term, "some clearer directive from Congress" is required before embarking on "such a nebulous inquiry" involving "such a marked departure from the literal meaning of the Act." *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 52 U.S.L.W. 4943, 4948 (U.S. June 28, 1984).

The jurisdiction of the federal courts over a particular dispute should be as clear and easily determinable as possible. *Detroit Trust Co.*, 293 U.S. at 42. Jurisdictional rules that make the very existence of federal jurisdiction turn on complex factual inquiries lead to increased, rather than decreased, burdens on courts and litigants. Too often, a time-consuming factual inquiry

into the bases of jurisdiction will end in a finding that there is no jurisdiction. Upon such a finding the entire dispute, including many issues already investigated in the federal hearings, will as is threatened here, be relegated to the state courts, after six years of litigation over jurisdiction. While Congress presumably is free, in creating federal causes of action, to mandate such a procedure, it seems particularly unwise for the courts to inject such uncertainties into federal causes of action by creating judicial exceptions to otherwise clear statutory language. The "sale of business doctrine" is just such an exception. Its adoption is both unwarranted and unwise.

CONCLUSION

The plain meaning of explicit statutory language, well settled canons of statutory construction, the structure of the federal securities laws, and this Court's previous opinions require that common stock of a traditional business corporation be treated as a "security." Accordingly, the Ninth Circuit's judgment must be reversed, and the "sale of business doctrine" rejected.

Respectfully submitted,

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APPENDICES

APPENDIX A

Document Title	Doc. No. within Record *	Page within Doc.	Page of Brief
(Deposition of Ivan K. Landreth, Sr. at 117-20, Attachment B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	11-14	3
(Letter from Ivan K. Landreth, Sr. to Gene Graf dated November 9, 1976, Appendix B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	157	3
(Landreth Timber Company listing with brokers, Appendix B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	158	3
(Affidavit of Ivan K. Landreth, Sr. Opposing Plaintiff's Motion for Summary Judgment on Securities Claims ¶ 4)	R. 123,	2	3
(Deposition of Eugene Graf at 8, Attachment B to Affidavit of James A. Smith, Jr. dated September 25, 1980)	R. 69,	277	3
(Deposition of Ivan K. Landreth, Sr. at 6, Attachement B to Affidavit of James A. Smith, Jr. dated September 25, 1980)	R. 69,	222	3
(Deposition of Ivan K. Landreth, Sr. at 24, Attachment B to Affidavit of James A. Smith, Jr. dated September 25, 1980)	R. 69,	224	3
(Deposition of Ivan K. Landreth, Sr. at 132, Attachment B of Affidavit of James A. Smith, Jr. dated September 25, 1980)	R. 69,	233	3

* The record filed with this Court is separated into numbered Documents, each Document indicated by a tabbed, numbered separator sheet. Individual pages within each tabbed Document were not numbered by the courts below. In making citations to the record, petitioner first cites the tabbed Document number and then provides a page number within the Document, page 1 being the Document page immediately following the tabbed separator sheet.

Document Title	Doc. No. within Record	Page within Doc.	Page of Brief
(Deposition of Eugene Graf at 69, Attachment B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	44	3
(Deposition of Eugene Graf at 175, 178, 182 and 249-69, Exhibit B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	51, 54,56, 66-83	3
(Deposition of Jack Branch at 24, Exhibit B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	87	3
(Deposition of Phillip A. Cook at 468-69, Attachment to Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	76-77	4, 4 n.5
(Deposition of Ivan K. Landreth, Sr. at 93-95, Attachment to Affidavit of John W. Hathaway in Support of Plaintiff's Motion for Summary Judgment on Securities Claim)	R. 114,	3-5	4, 4 n.5
(Supplemental Affidavit of Samuel S. Dennis in Opposition to Defendants' Motion for Summary Judgment ¶ 7)	R. 148,	4-5	4
(Affidavit of Peter Townsend in Support of Plaintiff's Motion for Summary Judgment ¶ 2)	R. 137,	2	5
(Deposition of Peter Townsend at 46, Attachment B to Affidavit of James A. Smith, Jr. dated September 28, 1980)	R. 69,	321	5
(Deposition of Peter Townsend at 87, Attachment B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	129	5
(Affidavit of Peter Townsend in Support of Plaintiff's Motion for Summary Judgment ¶ 7)	R. 137,	4-5	5
(Deposition of Peter Townsend at 102, Attachment B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	131	5

Document Title	Doc. No. within Record	Page within Doc.	Page of Brief
(Affidavit of Peter Townsend in Support of Plaintiff's Motion for Summary Judgment ¶¶ 3, 7 and 9)	R. 137,	2, 4-5, 5-6	5
(Affidavit of Peter Townsend in Support of Plaintiff's Motion for Summary Judgment ¶¶ 4-7)	R. 137,	2-5	5
(Affidavit of Peter Townsend in Support of Plaintiff's Motion for Summary Judgment ¶ 6)	R. 137,	3-4	5 n.7
(Landreth Timber Company listing with brokers, Appendix B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	158	6
(Deposition of Ivan K. Landreth, Sr. at 121-22, Attachment B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	15-16	6
(Landreth Timber Company listing with brokers, Appendix B to Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	158	6
(Affidavit of Ivan K. Landreth, Sr. Opposing Plaintiff's Motion for Summary Judgment on Securities Claims ¶ 4)	R. 123,	2	6
(Deposition of Ivan K. Landreth, Sr. at 73, Attachment B to the Affidavit of John W. Hathaway dated November 7, 1980)	R. 93,	5	8
(Deposition of Phillip A. Cook at 693-94, 729-32, and 734, Attachment to Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	103-04, 102, 104, 106-09, 111	8
(Supplemental Affidavit of Samuel S. Dennis in Opposition to Defendants' Motion for Summary Judgment ¶ 7)	R. 148,	4-5	8 n.9
(Supplemental Affidavit of Samuel S. Dennis in Opposition to Defendants' Motion for Summary Judgment ¶¶ 3-5)	R. 148,	2-4	8

Document Title	Doc. No. within Record	Page within Doc.	Page of Brief
(Deposition of Phillip A. Cook at 228-30, 243, 283 and 1005-06, Attachment to Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	41-43, 46, 58, 131-32	8
(Deposition of Phillip A. Cook at 243, Attachment to Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	46	9
(Deposition of Phillip A. Cook at 577, Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	91	9
(Supplemental Affidavit of Samuel S. Dennis in Opposition to Defendants' Motion for Summary Judgment ¶ 6)	R. 148,	4	9
(Supplemental Affidavit of Samuel S. Dennis in Opposition to Defendants' Motion for Summary Judgment ¶ 2)	R. 148,	2	9
(Deposition of Phillip A. Cook at 517-18, Attachment to Affidavit of John W. Hathaway dated November 25, 1980)	R. 108,	81-82	9
(Memorandum in Support of Defendants' Motion for Summary Judgment on Securities Claims at 11-12, dated September 25, 1980)	R. 68,	11-12	10
(Plaintiff's Motion for Summary Judgment on Securities Claims at 1, dated January 7, 1981)	R. 115,	1	10
(Supplemental Affidavit of Samuel S. Dennis in Oposition to Defendants' Motion for Summary Judgment ¶ 3)	R. 148,	2-3	42

APPENDIX B

Statutory provisions containing the words "unless the context otherwise requires":

United States Code (1982)	Short Title of Act(s)
12 U.S.C. §§ 1730a(a)(1), 1749bbb-2(a)	National Housing Act
15 U.S.C. § 77b	Securities Act of 1933
15 U.S.C. § 77ccc	Trust Indenture Act of 1939
15 U.S.C. §§ 78c(a), 78u(h)(13)	Securities Exchange Act of 1934
15 U.S.C. § 79b(a)	Public Utility Holding Company Act of 1935
15 U.S.C. § 80a-2(a)	Investment Company Act of 1940
15 U.S.C. § 80b-2(a)	Investment Advisers Act of 1940
15 U.S.C. § 717a	Natural Gas Act
15 U.S.C. § 1821	Horse Protection Act
15 U.S.C. § 2903	National Climate Program Act
15 U.S.C. § 3703	Stevenson-Wydler Technology Innovation Act of 1980
16 U.S.C. § 715n	Migratory Bird Conservation Act of 1929
16 U.S.C. § 1802	Magnuson Fishery Conservation and Management Act
16 U.S.C. § 2802	National Aquaculture Act of 1980
19 U.S.C. § 1202	Tariff Act of 1930
20 U.S.C. § 1132(b)	Higher Education Act of 1965
30 U.S.C. § 351	Mineral Leasing Act for Acquired Lands
33 U.S.C. § 1001	Oil Pollution Act, 1961, as amended
33 U.S.C. § 1222	Ports and Waterways Safety Act
33 U.S.C. § 1502	Deepwater Port Act of 1974
33 U.S.C. § 1702	National Ocean Pollution Planning Act of 1978
39 U.S.C. § 102	Postal Reorganization Act

United States Code (1982)	Short Title of Act(s)
42 U.S.C. § 201(c)	Public Health Service Act
42 U.S.C. § 1395hh	Health Insurance for the Aged Act
42 U.S.C. § 3002	Older Americans Act of 1965
42 U.S.C. § 4003(a)	Flood Disaster Protection Act of 1973
42 U.S.C. § 7703	Earthquake Hazards Reduction Act of 1977
42 U.S.C. § 9102	Ocean Thermal Energy Conversion Act of 1980
44 U.S.C. § 1501	Printing and Binding Act
45 U.S.C. § 702	Regional Rail Reorganization Act of 1973
45 U.S.C. § 1104	Northeast Rail Service Act of 1981
46 U.S.C. § 888	Shipping Act, 1916
47 U.S.C. § 153	Communications Act Amendments, 1952
47 U.S.C. § 702	Communications Satellite Act of 1962
49 U.S.C. § 1301	Federal Aviation Act of 1958
50 U.S.C. § 466	Military Selective Service Act